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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 388

WILLIAM BATTLE,

Petitioner,

vs.

ESTATE OF EDWARD A. GALLAGHER, LOTTIE GALLAGHER, TRUSTEE, ARTHUR A. GALLAGHER, INDIVIDUALLY AND T/A E. A. GALLAGHER & SONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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September, 1956.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

William Battle prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on April 11, 1956.

CITATIONS TO OPINION BELOW

The opinion of the Maryland Court of Appeals (R. 188) is printed in Appendix B hereto, infra, at p. 11 and is reported in 122 A. 2d 93.

JURISDICTION

Judgment of the Maryland Court of Appeals was entered on April 11, 1956 (R. 210). Rehearing which was timely applied for, was denied on June 8, 1956 (R. 210). The Jurisdiction of this Court is invoked under the provisions of 28 USC Sec. 1257(3) since Petitioner claims that he has been denied a right set up under the statutes of the United

States. The Federal question was raised in the trial court in the request to charge the jury (R. 135-140). The trial court held that the ICC regulations prevailed. The Court of Appeals of Maryland passed on the question in its opinion (R. 207-209).

QUESTION PRESENTED

Did the Court of Appeals of Maryland err in refusing to follow the policy set forth in ICC regulations then promulgated under Title 49 Sec. 301, etc. (known as Motor Carrier Act) and thus thwart principles eliminating evils of one-way trip leases used as a subterfuge in interstate commerce, contrary to the National Transportation Policy clearly approved by this Court?

STATUTE INVOLVED

The statutory provision involved is Sec. 304 of Title 49 USC (Motor Carrier Act), printed in Appendix A, infra, page 7. Particularly involved are the Regulations of ICC No. 207.4, printed in Appendix A, infra, page 7.

STATEMENT

The Petitioner, William Battle, is a resident of the State of Delaware, who sustained severe and near fatal personal injuries resulting from an automobile-truck collision. Respondent, (hereinafter called Gallagher) was a carrier duly franchised by the ICC to haul freight in interstate commerce.

For approximately six months prior to the collision resulting in this action, the Respondent, in order to fulfill its commitments to haul steel from Bethlehem Steel Company in Sparrows Point, Maryland to the Budd Company in Philadelphia, Pennsylvania leased a tractor-trailer to supplement its own fleet of trucks. The tractor was owned by one Taylor, a co-defendant in the trial Court, and the trailer owned by one Steger, who acted as driver of the

entire unit, and also a co-defendant in the trial Court. That during this six month period, the tractor-trailer unit of Taylor-Steger was engaged daily in hauling steel from Sparrows Point to Philadelphia. Each of these trips was made under authority of the franchise granted to Gallagher since neither Taylor or Steger had authority to engage in interstate commerce.

In order to cloak the Taylor-Steger equipment with such authority Gallagher employed for each of said trips a device known as a "one way trip lease". The equipment retained on the tractor doors the ICC identification placards issued by Gallagher on all return trips as well as on the trips to Philadelphia. Notwithstanding this continuous operation of non-owned equipment by Gallagher for a period of six months, each trip was governed by the so called one way trip lease which on its face stated that each trip was to begin in Sparrows Point and terminate in Philadelphia.

On the morning of January 21, 1953, Steger, at Gallagher's direction proceeded to Bethlehem Steel Company to obtain a load. Steger, after resting, proceeded toward Philadelphia. Enroute, Steger, as was his custom, stopped at a diner near Wilmington and from that point telephoned Gallagher's dispatcher in Baltimore for further instructions. Steger was instructed to ". . . come back and pick up another load" as soon as he had finished unloading. Steger finally unloaded around midnight and began back toward Bethlehem Steel Company.

On the trip back the tractor-trailer still carried certain wooden blocks and racks needed to secure the steel on future trips and still displayed ICC placards stating that the vehicle is being "Operated By E. A. Gallagher & Sons". At approximately 1:30 A.M. on January 22, 1953, as Steger drove South on U. S. Route No. 13 near Naaman's Corner, Delaware, Steger while attempting to clean his windshield with newspaper negligently operated this vehicle on the

wrong side of the road causing a collision with the automobile of your Petitioner. Your Petitioner as a result is crippled for life.

Suit was filed by your Petitioner in the Circuit Court for Baltimore County against Gallagher, Taylor and Steger for the negligent operation of the tractor-trailer. The case was submitted to the jury by the trial Judge against all three defendants after overruling Gallagher's motions for directed verdicts. The jury awarded your Petitioner a verdict in the amount of $78,000 against all defendants. Appeals were noted to the Court of Appeals of Maryland by all defendants, but both Taylor and Steger subsequently dismissed their respective appeals.

The Court of Appeals of Maryland reversed the judgment of the Circuit Court of Baltimore County relying principally upon the authority of *Costello* v. *Smith*, 179 F. 2d 715, 16 ALR 2d 954, and disregarding the opinion of Judge Barksdale in *Hodges* v. *Johnson*, 52 F. Supp. 488.

The problem presented by the use of equipment leases in trucking operations is not a new problem to this Court. The evils of leasing of vehicular equipment has long been under scrutiny by the ICC. As a result of a prolonged investigation and hearings in *Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers*, reported in 52 MCC 675, the ICC on May 18, 1951 promulgated certain regulations governing the operation of leased vehicles (See, infra, pp. 7-10). Rule 207.4 clearly states that the operation attempted by Gallagher is improper. It requires that no lease be for a period of less than 30 days and that the lessee shall assume complete control over the leased equipment. Thus, in an effort to strengthen the protection of the public, the evils of the trip leasing subterfuge were eliminated pursuant to the policy of the Congress as set forth in the National Transportation Policy, 49 USC preceding Sec. 1. This Court in *American Trucking Association, Inc.* v. *U. S.*,

344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337, decided on January 12, 1953, ten days before the collision, that the regulations imposed by the ICC were in the interest of preserving the safety requirements protecting the public, which were not being observed by exempt lessors.

Whether a State Court can disregard the clear policy of a Federal Statute, the regulation of a Federal Agency and a decision of this Court presents a Federal question of great importance. The Federal question presented to the trial Court and to the Court of Appeals of Maryland is an inherent part of the case.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals of Maryland is erroneous because it disregards the policy of the Congress in regulating motor carriage in interstate commerce and also the strong National Transportation Policy of the Congress in regulating transportation between the States. *American Trucking Association, Inc. v. U. S.*, 344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337. This case recognized the evils which trip leasing presented, the strong national policy assuring safe transportation and the elimination of these evils. The Court clearly foresaw the difficulty in fixing the responsibility of lessees for accidents under the "trip lease" arrangement. Effective regulations were promulgated to end the perils which are highlighted by this case; nevertheless, the Maryland Court of Appeals bypassed the policy set forth in these Rules. *Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers*, 52 MCC 675. The Federal Government having acted in the field of regulating "trip leases" in interstate commerce, it is incumbent upon the States to apply the regulations. The State Court is bound to supplement the national policy by enforcement of the Commission's and this Court's findings; hence, it is in error when it fails to do so.

It is of extreme importance to note that the collision in this case occurred some ten days after the decision in the *American Trucking Association* case had been filed by this Court.

2. Clearly the question presented is of importance in the administration of interstate trucking operations. This Court in the *American Trucking Association* case observed:

> "Thus the practice of using leased equipment and that obtained by interchange is brought into conformity with the regulation of carrier owned equipment to avoid evils that had grown up in that practice."

Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in every accident case involving the use of leased equipment in interstate motor carrier operation. See also *Gibson* v. *Moore Motor Freight*, 75 N.W. 2d 212 (Minn.) decided February 17, 1956, which disregarded the ICC regulation and decision of this Court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September, 1956.

APPENDIX A

RELEVANT PORTIONS OF MOTOR CARRIER ACT (49 U.S.C.)

304. POWERS AND DUTIES OF COMMISSION — (a) Powers and duties generally

It shall be the duty of the Commission —

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment

* * * * * *

(6) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * * *

RELEVANT PORTIONS OF I.C.C. REGULATIONS

207.1 Applicability. The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers

* * * * * *

207.4 Augmenting equipment. Other than equipment exchanged between motor common carriers in interchange service as defined in 207.5, authorized carriers may perform

authorized transportation in or with equipment which they do not own only under the following conditions:

(a) The contract, lease, or other arrangement for the use of such equipment:

(1) Shall be made between the authorized carrier and the owner of the equipment;

(2) Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements;

(3) Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting;

(i) That equipment specified in section 203(b), (4a), (5), and (6) of the act, (49 U.S.C. 303(b), (4a), (5) and (6)), may be utilized by authorized carriers under contracts, leases, or other arrangements applying for any period, upon completion of a movement in which such equipment is exempt from regulation by the Commission except as to qualifications and maximum hours of service of employees and safety of operation and standards of equipment, under the provision of the act just cited, and is next being utilized by the authorized carrier in a loaded movement in any direction and/or series of loaded movements over reasonably direct routes in the direction of the general area in which the exempt movement originated, or in the direction of the area in which the equipment is based; provided the authorized carrier receives, prior to the execution of the lease, a statement signed by the owner of the equipment, or some one duly authorized to sign for the owner, authorizing the driver to lease the equipment for the return movement or movements, and a statement signed by the driver specifying the origin, destination, and

the time of the beginning and ending of the exempt movement.

(ii) That equipment owned by an automobile carrier or tank-truck carrier or held by such authorized carriers under lawful leases and used in the transportation of motor vehicles and liquid commodities, in bulk, respectively, may be leased or subleased to other such authorized carriers for round trips.

(4) Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the authorized carrier, as follows:

(i) For the duration of said contract, lease or other arrangement, except that provision may be made therein for considering the lessee as the owner for the purpose of subleasing under this part to other authorized carriers during such duration;

(ii) When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, during the period the equipment is operated by or for the authorized carrier, lessee;

(5) Shall specify the compensation to be paid by the lessee for the rental of the leased equipment; provided, however, that such compensation shall not be computed on the basis of any division or percentage of any applicable rate or rates on any commodity or commodities transported in or on said equipment, or on a division or percentage of any revenue earned by said equipment during the period for which the lease is effective, except this latter proviso, relating to compensation, shall not apply to:

(i) Equipment used in the transportation of household goods, of motor vehicles by automobile carriers ,of liquid commodities, in bulk, in tank vehicles, of oil-field and pipe-line equipment, ma-

terials and supplies, as described in Mercer Extension - Oil Field Commodities, 46 MCC 845, and vehicles equipped with mechanical refrigeration when used in the transportation of commodities requiring refrigeration. (Subparagraph (5) amended, 20 F.R. 7905, Oct. 20, 1955; 20 F.R., 8639,

(6) Shall specify the time and date or the circumstance on which the contract, lease, or other arrangement begins, and the time or the circumstance on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment, as required by paragraph (b) of this section; and

(7) Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

No. 136

OCTOBER TERM, 1955

ESTATE OF EDWARD A. GALLAGHER, LOTTIE GALLAGHER, TRUSTEE, ARTHUR A. GALLAGHER, INDIVIDUALLY AND TRADING AS E. A. GALLAGHER & SONS

v.

WILLIAM BATTLE

Before Brune, CJ., Delaplaine, Collins and Henderson, JJ.

OPINION BY COLLINS, J.

FILED: APRIL 11TH, 1956.

This is an appeal from a judgment entered on the verdict of a jury in favor of the plaintiff, appellee, William Battle, for injuries received in an automobile collision.

Previous to the date of the injury herein, the Budd Company in Philadelphia ordered steel from the Bethlehem Steel Company in Sparrows Point, Maryland. The Estate of Edward A. Gallagher, Lottie Gallagher, Trustee, Arthur A. Gallagher, Individually and trading as E. A. Gallagher & Sons, hereinafter designated as Gallagher, appellant, was a common carrier of freight by truck authorized to operate under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (I.C.C.). In this capacity it was engaged in hauling steel from Sparrows Point to the Budd Company in Philadelphia. Because Gallagher did not have sufficient equipment to haul the

order, it leased a large tractor trailer unit by what is termed as a "trip lease". The tractor was owned by David Taylor and the trailer by Harry F. Steger. Neither Taylor nor Steger had a certificate of public convenience and necessity from the I.C.C. For six months prior to the accident in this case, which occurred about 1:30 A. M. on January 22, 1953, Steger had been driving the leased tractor trailer unit making many trips in hauling steel for Gallagher from the Bethlehem Steel Company to the Budd Company.

On the morning of January 21, 1953, in pursuance of a lease executed on January 20th, Steger proceeded to the Bethlehem Steel Company and obtained a load of steel. After resting he proceeded toward Philadelphia about 4 P. M. In the trial of the case, when asked whether on other occasions between Sparrows Point and Philadelphia he would telephone Gallagher to find out whether Gallagher wanted him to haul another load, Steger answered "Yes", and said that, as he had done on other trips for Gallagher from Sparrows Point to Philadelphia, he stopped at a diner near Wilmington, Delaware, and called Gallagher's dispatcher to see whether Gallagher wanted to engage him to haul another load. Steger said that, in reply to his inquiry, Gallagher's dispatcher "said as soon as I could load at Budd Company I'd come back and pick up another load." This conversation in denied by Gallagher but for the purposes of this case we must assume that it occurred. Steger then proceeded to Philadelphia and delivered his load of steel to Budd. As soon as he got something to eat he started back toward Baltimore. On his way back, on January 22, 1953, while cleaning the windshield of the tractor with a newspaper, and while the tractor trailer was in motion under the Pennsylvania Railroad underpass at Naaman's, Delaware, at about 1:30 A. M., he collided with the automobile driven by the plaintiff, appellee, William Battle. As a result, Battle was injured. In the trial below the appellee recovered a judgment against Taylor, Steger, and Gallagher. From that judgment all of the defendants appealed to this Court.

Prior to the hearing in this Court, Taylor and Steger dismissed their appeal. Therefore, Gallagher is left as the

sole appellant here. No issue is here made as to Steger's negligence in the operation of the tractor trailer. The sole question is Gallagher's responsibility for Steger's negligence. As plaintiff gave no notice to the defendants of his intention to rely on Delaware law, the case was decided under the law of Maryland. *The Maccabees* v. *Lipps*, 182 Md. 190, 196, 34 A. 2d 424; *Wilson* v. *Dailey*, 191 Md. 472, 476, 62 A. 2d 284.

As on all previous trips when Steger was hauling for Gallagher, on this particular trip a trip lease was entered into on January 20, 1953, between Taylor and Gallagher, wherein Taylor as lessor, by Steger, leased to Gallagher as lessee the tractor and trailer above mentioned. The lease contained a number of provisions, among which were the following. "The term of lease shall be the duration of one single trip from Sparrows Pt., Md. to Phila., Pa." The equipment should be under the complete control of the lessee for the limited purpose of safety to the public and safe delivery of the shipment. The lessor agreed to fully maintain the equipment in good condition and to comply with all safety requirements of the I.C.C. The lessee should not be liable for any damage or depreciation to the motor vehicle while in its possession under the lease. The lessor agreed to be fully responsible to the lessee for any and all negligence of himself and the operator of the equipment. The lessor further agreed to supply the services of a competent driver, to pay Social Security and other benefits to all employees handling the equipment, to indemnify and save harmless lessee against any loss or damage resulting from the negligence and incompetence of all employees handling the equipment. Lessor also agreed "to indemnify and save harmless the Lessee against any loss resulting from claims brought against Lessee for any property damage or bodily injury, or both, sustained by anyone while the leased equipment is under any control of the Lessee." It was agreed that the lease terminated when "(a) a trailer owned by the Lessor is unloaded at the above described destination (b) a trailer not owned by the Lessor is detached at the above described destination. Lessor certifies that the operator of leased vehicle was examined by a

physician on or about as required by the I.C.C. and agrees to furnish copy of said physician's examination certificate. The Lessee assigns and affixes to said vehicles for the duration of this lease its Interstate Commerce Commission identification placards which must be removed at the aforementioned destination and returned to the Lessee before full payment of the rental sum is made. Lessor shall carry public liability insurance in the minimum amount of $5,000.00 for injury to one person and in the minimum amount of $10,000.00 for injury to more than one person arising out of any one accident and property damage insurance in the minimum amount of $5,000.00 covering injury or damage to the property of other persons. Lessor shall furnish Lessee with certificate of insurance evidencing the existence of such policies. Any alteration hereof either in the names of parties or the other provisions, shall annul, cancel and invalidate this lease insofar as any further obligations thereunder of E. A. Gallagher & Sons, as Lessee, are concerned."

On each trip to Philadelphia, including that made on January 21, 1953, there were placed on the tractor doors placards which stated "Operated by E. A. Gallagher & Sons, I.C.C. MC 77569." The testimony was disputed as to whether these placards were on the tractor at the time of the accident. However, Steger admitted that he was instructed by Gallagher to remove the placards after he delivered the steel to the Budd Company, and the lease so provides.

The primary question before us in this case is whether there was legally sufficient evidence to submit to the jury the question of Gallagher's liability for Steger's negligence on the return trip from Philadelphia.

It is stated in Restatement of the Law of Torts, Negligence, Section 428: "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on

the activity." There is no doubt that, if the accident had occurred on the trip from Sparrows Point to Philadelphia, for which trip the tractor trailer was leased and on which the I.C.C. placards were placed by Gallagher, Gallagher would have been liable for Steger's negligence in spite of the fact that Taylor agreed to save Gallagher harmless against bodily injury to other persons. *H. E. Wolfe Construction Co.* v. *Fersner*, (C.C.A. 4th), 58 F. 2d 27; *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94; *Venuto* v. *Robinson*, 118 F. 2d 679; *War Emergency Co-op. Assn.* v. *Widenhouse*, (C.C.A. 4th), 169 F. 2d 403; *Kemp* v. *Creston Transfer Co.*, 70 F. Supp. 521; *Gassaway* v. *Barry*, 123 F. Supp. 670; *Brown* v. *Bottoms Truck Lines*, 227 N. C. 299, 42 S. E. 2d 71; *Newsome* v. *Surratt*, 237 N. C. 297, 74 S. E. 2d 732; *Brabham* v. *Southern Asphalt Haulers, Inc.*, 223 S. C. 421, 76 S. E. 2d 301; *Eli* v. *Murphy*, 39 Cal. 2d 598, 248 P. 2d 756; *Lehman* v. *Robertson Truck-A-Way*, 122 Cal. App. 82, 264 P. 2d 653; *Trautman* v. *Higbie*, 10 N. J. 239, 89 A. 2d 649; Annotation, 17 A. L. R. 2d 1396; *Regal Laundry Co* v. *Abell Co.*, 163 Md. 525, 163 A. 845; *Maryland Casualty Co.* v. *Sause*, 190 Md. 135, 57 A. 2d 801, and cases there cited; *Wood* v. *H. W. Gossard Co.*, 204 Md. 177, 103 A. 2d 130.

In *Hodges* v. *Johnson*, 52 F. Supp. 488, heavily relied on by the appellee, Jocie had a certificate from the I.C.C. permitting him to haul general commodities in interstate commerce. Johnson, who was engaged in the trucking business, had no such certificate. Jocie entered into a lease agreement whereby Jocie would lease the truck to Johnson who would haul in interstate commerce in the name of Jocie and under Jocie's certificate and license from the I.C.C. All freight was hauled on standard bills of lading in the name of Jocie who paid certain taxes, insurance premiums, and other expenses. Johnson received eighty percent of the freight charges and Jocie twenty percent. Under this arrangement Johnson's truck proceeded from Charlotte, North Carolina, to Roanoke, Virginia, deliverd the load and was returning empty to Charlotte with a bill of lading made out and signed in the name of Jocie by an employee of Johnson when the accident occurred. Jocie sometimes ob-

tained a return load of freight for Johnson's truck and such return freight was handled the same way. Johnson never hauled return loads of interstate freight for himself but always for and in the name of Jocie. Jocie was held liable for the accident. Under the more or less partnership arrangement between Johnson and Jocie it is clear in that case that the lease between Jocie and Johnson covered both the trip from Charlotte to Roanoke and return.

Steger, at the time he testified that he called Gallagher's dispatcher on the way to Philadelphia and was told to return and pick up another load, had been called by plaintiff's counsel as an adverse witness, subject to cross-examination, under the provisions of Code, 1951, Article 35, Section 8. The appellant objects to the introduction of this testimony and claims that Steger was an adverse party to the plaintiff only in a strictly technical sense, but actually so far as the issue of Steger's relationship to Gallagher was concerned, the plaintiff and co-defendant, Steger, were on the same side of the case. For the purposes of this opinion, we will assume without deciding, that the trial court was correct in overruling Gallagher's objection to that part of Steger's testimony.

The appellee contends that there was sufficient evidence for the jury to find that Gallagher was responsible for Steger's negligence under the doctrine of *respondeat superior*. In the case of *Henkelmann* v. *Insurance Co.*, 180 Md. 591, 26 A. 2d 418, Judge Delaplaine discussed this doctrine and what was there said appears pertinent to the question before us here. We quote at length from that opinion. "This doctrine [*respondeat superior*] was founded on the principle that 'every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it.' *Farwell* v. *Boston & Worcester R. R. Corp.*, 4 Metc., Mass., 49, 55, 38 *Am. Dec.* 339, 340. The courts, however, have regarded the doctrine with jealousy and have confined it within limits as narrow as are consistent with the true interests of society. *Wood, Master and*

Servant, 2d Ed., Sec. 277. In 1840 the courts in England began to relax the doctrine by holding that it does not apply to independent contractors. In 1869 the Court of Appeals of Maryland, in an opinion by Judge Alvey, observed that the doctrine had been modified by the English decisions, and held that it is not applicable where the employee is 'a contractor, pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done.' *Deford* v. *State, to use of Keyser*, 30 Md. 179, 203. In 1884 the Court of Appeals said that the theory upon which liability under the doctrine is predicated is that the master is constructively present, so that the negligence of the servant is the negligence of the master. *Adams* v. *Cost*, 62 Md. 264, 267, 50 *Am. Rep.* 211. In 1901 this court stated that an essential element of the relation of master and servant is that the master shall have control of the employment and all of its details. *Baltimore Boot & Shoe Mfg. Co.* v. *Jamar*, 93 Md. 404, 413, 49 A. 847, 850, 86 *Am. St. Rep.* 428. Finally in 1932 we definitely decided that the test in determining whether a person is a servant or an independent contractor is whether the employer has the right of control over the employee in respect to the work to be performed. *State, to use of Boznango* v. *Blumenthal-Kahn Electric Co.*, 162 Md. 84, 92, 159 A. 106. Thus, it was held by this court that a salesman who sold goods on commission, operated his own car at his own expense and received no directions as to his work or route, was an independent contractor, so that his employer was not liable for injuries caused by him in the operation of his car. *Washington News Co.* v. *Satti*, 169 Md. 489, 182 A. 286. In recent years, on account of the extensive use of the motor vehicle with its accompanying dangers, the courts have realized that a strict application of the doctrine of *respondeat superior* in the modern commercial world would result in great injustice. * * * It is now held by the great weight of authority that a master will not be held responsible for negligent operation of a servant's auto-

mobile, even though engaged at the time in furthering the master's business unless the master expressly or impliedly consents to the use of the automobile, and *had the right to control the servant in its operation, or else the use of the automobile was of such vital importance in furthering the master's business that his control over it might reasonably be inferred. Khoury* v. *Edison Electric Illuminating Co.*, 265 Mass. 236, 164 N. E. 77, 60 A. L. R. 1159; *Aldrich* v. *Tyler Grocery Co.*, 206 Ala. 138, 89 So. 289, 17 A. L. R. 617; *Dohner* v. *Winfield Wholesale Grocery Co.*, 116 Kan. 237, 226 P. 767; *Gall* v. *Detroit Journal Co.*, 191 Mich. 405, 158 N. W. 36, 19 A. L. R. 1164; *Harrington* v. *H. D. Lee Mercantile Co.*, 97 Mont. 40, 33 P. 2d 553; *James* v. *Tobin-Sutton Co.*, 182 Wis. 36, 195 N. W. 848, 29 A. L. R. 457; *Kassela* v. *Hoseth*, 217 Wis. 115, 258 N. W. 340; *Stockwell* v. *Morris*, 46 Wyo. 1, 22 P. 189; 5 *Am. Jur.*, Automobiles, Sec. 393; 5 *Blashfield, Cyclopedia of Automobile Law and Practice*, Sec. 3079. * * * In other words, a principal employing an agent to accomplish a result, but not having the right to control the details of his movements, is not responsible for incidental negligence while such agent is conducting the authorized transaction. 1 *Restatement of Agency*, Sec. 250.

Of course, even an agent may be subject to the control of his principal in respect to some portion of the work to be performed, and under such circumstances the doctrine of *respondeat superior* can be invoked. *But it has been distinctly held that the doctrine applies in such a case only when the relationship of master and servant existed in respect to the very thing from which the injury arose. Leachman* v. *Belknap Hardware & Mfg. Co.*, 260 Ky. 123, 84 S. W. 2d 46." (Italics supplied here.) See also *Globe Indemnity Co.* v. *Victill Corp.*, ... Md. ....., 119 A. 2d 423.

The manager of Gallagher in Baltimore testified that he did not recall having any conversation with Steger about the lease of January 20, 1953. He always told the truck drivers when to load the steel at the mill. Steger and other drivers were constantly instructed as to the provisions of the lease and how to keep their logs, and to remove the I.C.C. placards after the load was delivered. If Steger did

not abide by the I.C.C. regulations Gallagher might not give Taylor another lease. These instructions would not negative the fact that the tractor and trailer were operated by an independent contractor. Steger was paid by Taylor, not by Gallagher. Steger testified without contradiction that he was not told by Gallagher the route by which he should transport the steel. He said: "You can use Route 1, Route 40, or whichever route you want to use. They never told you what route to use as long as you got the steel up there." He further said that when he was instructed to pick up a load at a certain time, he was told to deliver the load as fast as he could, within reason and safety. He was not told to deliver the load by a certain time. There was no evidence that Gallagher had the power to control and direct Steger in the rendering of his services. The general manager of Gallagher in Philadelphia testified in reference to the trip leases: "It makes it easier for us to engage the services of these independent owner-operators because we have a job of work that takes it from Point A to Point B, and due to the sporadic nature at times within certain hours of the day, we have no further use for them, and it permits them to then engage themselves to other carriers for a possible return load or a possible trip to another point distant from Point B, let's say the destination in our particular case, so, therefore, they are free to act for themselves, and that is what I mean when I say it makes it fluid as far as they are concerned. They have a freedom of action which, if we had another arrangement, they wouldn't be so free to engage themselves to other carriers." There is no evidence to the contrary. Steger said he felt free to haul for anyone he wanted. Even after Steger had been told to return to Sparrows Point for another load, there was no obligation on him to do so. Gallagher had no such control over Steger to so compel him. It merely offered Steger another contract. When his trailer was unloaded at The Budd Company, Steger could have picked up another load in Philadelphia and taken it to any destination he chose. If he had done so, Gallagher would have had no right of action against him or Taylor. We are of opinion that there was no evidence to support the doctrine of *respondeat superior* in the instant case.

The appellee further contends that there was legally sufficient evidence from which the jury could find that the original trip lease was modified by the telephone conversation asking Steger to return for another load. Of course, where a contract is in writing, parol evidence is not admissible to add to, detract from, or vary the terms of the agreement. However, the parties may, subsequent to entering into the contract, rescind it by mutual consent, enter into a new contract, or modify the existing one. *Furness, Withy & Co.* v. *Randall*, 124 Md. 101, 91 A. 797. As said by Professor Williston in his work on Contracts, Vol. 3, Sec. 623, p. 1792: "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered." It was said in *Saul* v. *McIntyre*, 190 Md. 31, 36, 57 A. 2d 272: "* * * an oral lease may be construed or modified by conduct, especially if it is subsequently recognized in writing under seal." There is no evidence here that by the telephone call the parties intended the lease to cover the return trip. Their actions show the contrary. The evidence shows that the call on January 21st was not the first time that Steger had been requested to carry another load. It had been done on other trips. There were separate leases for each trip. If, after those other trips, a telephone call was intended to make the lease cover the return trip, the future leases would have so provided. The parties did not so provide in the lease of January 20th.

As to the I.C.C. placards on the truck at the time of the accident, Steger admitted that he was instructed by Gallagher to remove these placards after delivering the load of steel to the Budd Company. The fact that they were not removed was in no way the fault of Gallagher. The accident occurred at night and, therefore, the placards were not seen by the appellee and they in no way influenced the operation of appellee's motor vehicle or were in any way responsible for Steger's negligence and the consequent injury to the appellee.

In *Simon* v. *McCullough Transfer Co.*, 155 Ohio State 104, 98 N. E. 2d 19, Bolton, who had no Public Utility Commission or I.C.C. permit, was engaged by McCullough Transfer Company, which had such permits, to haul coal whenever it was available from Grove City, Pennsylvania, to the Youngstown Sheet and Tube Company in Struthers, Ohio. McCullough's permits were on Bolton's truck at the time of the accident. Defendant McCullough hired many other truckers under the same arrangements. Bolton had hauled coal for defendant for approximately a year before the date of the accident, although not restricted to haul only for the defendant. He chose his own route for making his trips and was not required to return to defendant's office or to the coal mine after he had picked up a shipment. All expenses of the truck, including costs of gasoline and oil, were paid by Bolton, and he was paid $1.20 per ton for the coal he hauled. On the day of the accident Bolton had delivered his last load to the Youngstown Company at about 5:30 P. M. By that time the coal mine was closed down and his work for that day was finished as far as the defendant was concerned. Bolton then proceeded with his empty truck to a beer garden and approximately two hours later was involved in the accident, which occurred between two and three miles from where he had delivered the coal. The Supreme Court of Ohio in that case held that at the time of the accident Bolton was an independent contractor, in no sense under McCullough's guidance or control and that McCullough was not liable.

In *Costello* v. *Smith*, (U. S. Ct. of App. 2d Cir., January 19, 1950), 179 F. 2d 715, 16 A. L. R. 2d 954, Johnson Motor Lines, Inc., (Johnson), was the carrier with the I.C.C. permit. Johnson executed a one-trip lease with a truck owner named Withers. Withers employed Smith to drive the truck. Withers had no liability insurance. Smith drove Withers' tractor and trailer transporting freight from Charlotte, North Carolina, to Providence, Rhode Island. The freight had been delivered and the I.C.C. tags had been returned to Johnson's terminal in Providence. Smith was driving the tractor trailer back when he had the acci-

dent. In holding Johnson not liable, it was said in that case: "Johnson was under no obligation to furnish a return load of freight and it was not customary for Johnson to do so. Withers had previously leased his equipment to Johnson for other trips, as well as to other carriers. It is conceded that if the collision had happened on the outbound trip to Providence, Johnson as lessee of the truck would have been liable for the truck driver's negligence. A number of cases have so held. This is on the principle that one who can lawfully operate only under a public franchise cannot escape liability by engaging an independent contractor to carry on the activity for him. Restatement, Torts, Section 428. It is an exception to the independent contractor rule. However, that principle does not reach the present case. Here the independent contractor, Withers, had performed his contract with Johnson, the truck had been redelivered to Withers' agent Smith, and in returning to Charlotte, N. C., Smith was engaged on Withers' business, not on Johnson's. On general principles of agency Smith's negligence cannot be imputed to Johnson. The appellant argues that the exception to the rule of non-liability for the torts of an independent contractor should cover the return trip of the truck no less than the outbound trip. The argument, if we understand it, relies both on the federal statute and the local law of Connecticut. As to the former, it is urged that to permit Johnson to escape liability will subvert the policy of the Act in so far as it seeks to provide for protection of the public. See Sections 304(a)(3), 315. Such appears to have been the view of Judge Barksdale in *Hodges* v. *Johnson*, D. C. Va., 52 F. Supp. 488. With due respect we are constrained to disagree. So far as concerns the safety of the public, determination of what regulation is required rests with the Commission; the legislative grant is not to the courts. So long as the properly constituted authority is content not to regulate further than it has the operation of empty trucks after the termination of a 'one-way lease,' the courts may not properly by judicial decision supplement the Commission's regulations. The Act itself does not prescribe conduct for Withers. He was not a 'common carrier by motor vehicle'

as defined in Section 303(a)(14) of the Act; hence he needed no certificate under Section 306. Nor was he a 'contract carrier' as defined in Section 303(a)(15) requiring a permit under Section 309. This is conceded in the supplemental briefs of the parties and the brief of the Commission as *amicus curiae*. Whether he was a 'private carrier of property by motor vehicle' as defined in Section 303(a)(17) we need not say. The Commission's brief states the 'Private carriers are subject to the Act only with respect to safety of operations, hours of service of employees and standards of equipment, as indicated in Section 204(a)(3)'; and in none of these respects was Withers shown to have been in default. Nor do the present regulations forbid a common carrier such as Johnson from making a one-way lease with an independent contractor such as Withers. In the absence of statutory command or of regulatory action by the Commission, we cannot say that a one-way lease is so far contrary to the policy of the Act that a court should impose liability on the lessee after the lease has ended. Nor has any Connecticut decision been brought to our attention which would require or permit the imposition of such a liability under the local law. The appellant urges that in the absence of specific local authority we should rely upon section 427 of the Restatement of Torts as evidence of the law of Connecticut. The principle there stated is that 'one who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work.' It may well be doubted whether a trailer-truck is an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives in applying the above-quoted principle. See *Greeley* v. *Cunningham*, 116 Conn. 515, 165 A. 678; Restatement, Torts, Section 427, Comment (a). But in any event, the principle assumes that the person held liable 'employs' an independent contractor to do dangerous work. Johnson's employment of Withers ended with discharge of the cargo of the truck at Providence. While it was probable that Smith would drive the truck back to Charlotte,

N. C. it was immaterial to Johnson whether or not he did so. It was no part of the venture for which Johnson had employed the independent contractor that the truck should return empty. As soon as the load was discharged at Providence, Smith was at liberty to obtain another load to transport in any direction for another carrier authorized under the Act."

In *Marriot* v. *National Mutual Casualty Co.*, 195 F. 2d 462, the lease was for no definite period. However, it stated that it was not to be for less than ten days. The accident occurred on the return trip from a hauling operation where the driver expected to pick up a return load for lessee. The Court there properly held on appeal that both the lessee and lessor were liable. The Court distinguished that case from *Costello* v. *Smith*, supra, on the ground that there, as in the instant case, the lease was specific and provided that it was for a one-way trip and, therefore, the lessor was relieved of any responsibility when the truck reached its destination.

As pointed out in *Costello* v. *Smith*, supra, the constituted authority for regulating the operation of common carriers in interstate commerce is the I.C.C. At the time this accident occurred the Commission was content not to regulate the operation of employee trucks after the termination of the one-way lease. The courts should not by judicial decision supplement the Commission's regulations.

The I.C.C., probably realizing that the return of trucks should be controlled, effective September 1, 1953, after the accident in this case, adopted a new regulation in regard to leasing of vehicles, one of the provisions of which was to make the minimum leasing period thirty days. 49 Code of Federal Regulations, page 115 (pocket supplement), Section 207.4(3). This section making a thirty day lease mandatory was drafted in compliance with the report of the I.C.C. in Ex Parte No. MC-43 in 52 Motor Carriers Cases 675.

In the case of *American Trucking Ass'ns* v. *United States*, 344 U. S. 298, 73 Sup. Ct. 307, 97 L. Ed. 337, decided January

12, 1953, before the effective date of the thirty day minimum regulation, the Supreme Court, in holding that this new regulation abolishing one trip leases was in the authority of the I.C.C.; that it did not violate public policy; that it was not unreasonable; and that there was no confiscation in enforcing this rule, said: "Thus the practice of using leased equipment and that obtained by interchange is brought into conformity with the regulation of carrier-owned equipment to avoid evils that had grown up in that practice." It is the responsibility of the I.C.C. that this rule was not made effective sooner, and not the responsibility of the courts.

The instant case is remarkably similar to *Simon* v. *McCullough Transfer Co.*, supra, and *Costello* v. *Smith*, supra. It differs from *Costello* v. *Smith* in that Gallagher wished Steger to return to Sparrows Point. As above stated there was no requirement on the part of Steger to return to Sparrows Point. If he wished to carry another load of steel to the Budd Company he could do so and obtain another lease. As in *Costello* v. *Smith*, supra, it was not part of the venture for which Gallagher had contracted with the independent contractor that the trailer should return empty. As in that case, the Taylor and Steger equipment here was not in default in any of the requirements of the I.C.C. As in that case, in the absence of statutory command or of regulatory action by the Commission, the courts cannot say that a one-way lease is so far contrary to the policy of the Act that we should impose liability on the lessee after the lease had ended. The I.C.C. did not see fit to outlaw these one trip leases until after the accident in this case.

We are of opinion that there was not legally sufficient evidence to submit to the jury the question of Gallagher's liability for Steger's negligence and, therefore, that the judgment against Gallagher should be reversed.

JUDGMENT REVERSED, WITH COSTS, WITHOUT A NEW TRIAL.